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# Private Arbitration and Antitrust Enforcement: A Conflict of Policies

John J. Finn

# PRIVATE ARBITRATION AND ANTITRUST ENFORCEMENT: A CONFLICT OF POLICIES

"Commercial arbitration is unquestionably a highly regarded method for private and expeditious settlement of business disputes. . . . However, its use with respect to antitrust matters has been controversial in the United States, where the idea of free competition is firmly imbedded in the federal antitrust concept."[1] In two recent cases, one in the United States Court of Appeals involving federal law,[2] the other in the New York Court of Appeals involving New York law,[3] this controversy was confronted. The question of the appropriateness of arbitration as a forum for the consideration of particular statutory issues has arisen a number of times.[4] The leading case framing the question is *Wilko v. Swan*, where the United States Court of Appeals stated:

> . . . [T]he remedy a statute provides for violation of the statutory right it creates may be sought not only in any "court of competent jurisdiction" but also in any other competent tribunal, such as arbitration, unless the right itself is of a character inappropriate for enforcement by arbitration. . . .[5]

In that case the Court of Appeals decided that arbitration is a competent tribunal for protection of the individual investor's statutory rights under the United States Securities Act. The Supreme Court reversed, however, construing the non-waiver provision of the Securities Act as prohibiting the investor from waiving his statutory rights to judicial trial and review.[6] In the two principal cases, *American Safety Equip. Corp. v. J.P. Maguire & Co.*,[7] and

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[1] Von Wartburg, Commercial Arbitration and Antitrust Matters in the European Economic Community, 21 Arb. J. (n.s.) 65 (1966). See this article generally for a discussion of how the same concerns facing the courts in the principal cases confronted the European Economic Community with the advent of the Common Market. "In Europe, where unlimited competition seldom was regarded as the only policy fostering an efficient economy, arbitral tribunals were more readily attributed the power to decide matters of restrictive trade regulation. . . . [F]ree competition as a publicly promoted and officially enforced safeguard of the growth of the Common Market . . . calls for a re-examination of the role of arbitral tribunals . . . , with special regard to their competence in antitrust litigation." Id.

[2] American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968), rev'g 271 F. Supp. 961 (E.D. La. 1966).

[3] Aimcee Wholesale Corp. v. Tomar Prods., Inc., 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968).

[4] In Fallick v. Kehr, 369 F.2d 899 (2d Cir. 1966) (Bankruptcy Act); United States ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., 364 F.2d 705 (2d Cir. 1966), petition for cert. dismissed, 385 U.S. 924 (1966) (Miller Act); and Evans v. Hudson Coal Co., 165 F.2d 970 (3d Cir. 1948) (Fair Labor Standards Act), arbitration of statutory claims was approved. In Wilko v. Swan, 346 U.S. 427, rev'g 201 F.2d 439 (2d Cir. 1953) (Securities Act); Leesona Corp. v. Cotwool Mfg. Corp., 204 F. Supp. 141 (W.D.S.C. 1962), aff'd, 315 F.2d 538 (4th Cir. 1963) (determination of status of patent); and Kingswood Management Corp. v. Salzman, 272 App. Div. 328, 70 N.Y.S.2d 692 (1947) (Emergency Price Control Act of 1942), statutory claims were held to be non-arbitrable.

[5] 201 F.2d 439, 444 (2d Cir. 1953).

[6] 346 U.S. 427 (1953).

[7] 391 F.2d 821 (2d Cir. 1968).

*Aimcee Wholesale Corp. v. Tomar Prods., Inc.*,[8] the respective courts found no explicit statutory bar to arbitration in the federal and New York antitrust statutes but ruled, nevertheless, that for reasons of public policy antitrust claims are "of a character inappropriate for enforcement by arbitration." These cases, then, have apparently resolved the controversy.

## I. The Cases

In *American Safety Equipment* plaintiff-appellant, American Safety Equipment Corporation (ASE), and defendant-appellee, Hickok Manufacturing Company, were parties to a license agreement under which Hickok granted to ASE an exclusive license to use the "Hickok" trademarks in connection with "safety protective devices" and "accessories." The license agreement contained a broad arbitration clause which provided:

> All controversies, disputes and claims of whatsoever nature and description arising out of, or relating to, this Agreement and the performance or breach thereof, shall be settled by arbitration in New York State in accordance with the laws of the State of New York and the rules then obtaining of the American Arbitration Association. Any award rendered in such arbitration shall be final and binding upon the parties and judgment may be rendered thereon by any court having jurisdiction.[9]

After a falling out between the parties, ASE filed complaints in the district court against Hickok and J.P. Maguire & Co., the claimed assignee of Hickok's royalty rights, seeking declaratory judgments that the license agreement was illegal and void *ab initio* and that no royalty obligations had or would accrue under it. The complaints alleged that several provisions of the agreement violated the Sherman Act[10] because they unlawfully extended Hickok's trademark monopoly and unreasonably restricted ASE's business. Hickok and Maguire invoked the arbitration clause, Maguire demanding arbitration of a claim for royalties due and Hickok demanding arbitration of all issues. Both defendants moved to stay ASE's declaratory judgment actions pending arbitration. Subsequently ASE moved for preliminary injunctions against arbitration. ASE's motions were denied and the two declaratory judgment actions were stayed pending arbitration. Arbitration was directed with respect to all claims, disputes and controversies between the parties relating to the license agreement, including the issue as to the validity thereof.[11] The court held that the arbitration clause was broad enough to encompass the claims of antitrust violations and found no public policy against referring them to arbitration.

The Court of Appeals reversed on the ground that antitrust claims are inappropriate for arbitration because of the pervasive public interest in enforcement of the antitrust laws and the nature of the claims that arise in such

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[8] 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968).

[9] Brief for Appellee Hickok at 6, American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968).

[10] 15 U.S.C. § 1 et seq. (1964).

[11] 391 F.2d at 823-24.

cases. The court reasoned that, in view of the potential magnitude of the public injury stemming from antitrust violations, it was hardly likely that Congress intended such claims to be resolved elsewhere than in the courts, nor the forum for trying antitrust violations to be determined by contracts of adhesion between alleged monopolists and their customers. In addition, the court felt that arbitration procedures, appropriate for the business solutions of problems, are inadequate for what are often complex antitrust issues requiring extensive and diverse evidence.

In *Aimcee* plaintiff-appellant Aimcee had purchased some $100,000 in merchandise from defendant-appellee Tomar. The contract, a form purchase order, contained the following broad arbitration clause:

> Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration in New York City, New York in accordance with the rules then obtaining of the American Arbitration Association, and judgment upon the award rendered may be entered in the highest court of the Forum, State or Federal, having jurisdiction.[12]

Aimcee sought arbitration both of its claim that merchandise shipped was defective and that advertising allowances had not been paid and also of Tomar's suit against Aimcee in the New York Supreme Court for breach of the agreement. Tomar agreed to arbitration but interposed a counterclaim asserting that Aimcee had unlawfully exacted a discriminatory price reduction in violation of both the Robinson-Patman Act[13] and the New York Donnelly Act.[14] Tomar asked $15,000 in treble damages. Aimcee moved for an order staying arbitration of this counterclaim. Tomar consented to the stay with respect to the alleged violation of federal law but resisted the stay as to the Donnelly Act claim. The supreme court denied Aimcee's application on the basis that the antitrust claim was related to the contract and was, therefore, arbitrable. The appellate division affirmed on the ground that there was no challenge to the validity of the arbitration agreement and that hence any particular claim arising out of the parties' contract was arbitrable.[15]

The New York Court of Appeals reversed[16] on the ground that commercial arbitration was inappropriate for consideration of problems involving the state's antitrust policy. According to the court, judicial control of antitrust controversies is an essential part of the statutory scheme. To allow the submission of such controversies to private arbitration, where the courts

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[12] Brief for Appellant at 2, Aimcee Wholesale Corp. v. Tomar Prods., Inc., 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968).

[13] 15 U.S.C. §§ 13, 13a-c, 21(a) (1964).

[14] N.Y. Gen. Bus. Law § 340 (McKinney 1968).

[15] 26 App. Div. 915, 274 N.Y.S.2d 459 (1966). If Tomar had claimed that the agreement was invalid because of antitrust violations that issue would have been a question for the court. In New York when a contract is challenged on the ground of illegality because in violation of a statute or of the public policy of the State, as distinguished from common law illegality, the validity of the contract is a threshold question for the courts, not one for the arbitrators. Durst v. Abrash, 22 App. Div. 2d 39, aff'd, 17 N.Y.2d 445 (1965). However, if Tomar had challenged the validity of the agreement, it would have lacked any basis for its demand for arbitration.

[16] 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968).

would have no say in the results reached, would dilute the judicial safeguards provided in the Donnelly Act, enhance the likelihood of erroneous decisions to the detriment of the public in general, severely diminish the deterrent effect of the law on antitrust violations and enable antitrust violators to insulate themselves from judicial scrutiny.

*American Safety Equipment* and *Aimcee* are the first two cases to have decided the precise issue of the *appropriateness* of arbitration for the resolution of antitrust issues. Previous cases involving the question of the arbitrability of antitrust issues were decided on other grounds.[17] The courts in the principal cases were concerned with whether, in cases where the arbitration agreement between the parties is broad enough to cover antitrust claims and where the question of the validity of the arbitration agreement does not serve to bar submission of the dispute to arbitration,[18] public policy prohibits the submission to private arbitration of antitrust issues arising in the context of a contract dispute otherwise subject to arbitration. The problem arises from what the court in *American Safety Equipment* sees as a "clash of competing fundamental policies."[19] The result of the present decisions is to delay arbitration proceedings until judicial resolution of the antitrust issues which often involve complicated and protracted litigation. Such a result apparently frustrates federal and state policies encouraging arbitration as a "prompt, economical and adequate solution of controversies."[20] A stay of arbitration,

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[17] In Silvercup Bakers, Inc. v. Fink Baking Corp., 273 F. Supp. 159 (S.D.N.Y. 1967) and Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 107 F. Supp. 532 (S.D.N.Y. 1952), rev'd on other grounds, 202 F.2d 731 (2d Cir. 1953), it was held that the antitrust claims were outside the scope of the arbitration agreements. Both cases were initiated as private treble damage suits and the courts found that the parties did not intend such claims to be arbitrated. In City Trade & Indus., Ltd. v. New Central Jute Mills Co., (S. Ct. N.Y., Special Term) 1967 Trade Cas. ¶ 72,197, and Standardbred Owners Ass'n v. Yonkers Raceway, Inc., 31 Misc. 2d 474, 220 N.Y.S.2d 649 (1961), it was held that the claims of illegality of the agreements based on antitrust violations were for the courts. See note 15 supra. In Greenstein v. National Skirt & Sportswear Ass'n, 178 F. Supp. 681 (S.D.N.Y. 1959), appeal dismissed, 274 F.2d 430 (2d Cir. 1960), the court refused to stay arbitration under a collective bargaining agreement even though the plaintiffs claimed that the agreement violated the Sherman Act, on the ground that the antitrust claim was not substantial and therefore a stay of arbitration was not warranted.

[18] In *Aimcee* the validity of the agreement was not challenged (see note 15 supra) and thus the question was not present. If the question had been raised the court would have had to decide the antitrust issues in order to determine the validity of the agreement. In federal courts the question of the validity of the contract containing the arbitration clause is not generally for the courts. "[A] federal court may consider only issues relating to the making and performance of the agreement to arbitrate." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967). Thus in *American Safety Equipment* the court did not withdraw the entire question of the validity of the license agreement and the arbitration clause from the arbitrators. It pointed out that, even if the contested provisions of the agreement were found invalid because they were in violation of the antitrust laws, the question of the validity of the remaining parts of the agreement, including the arbitration clause, remained by virtue of their possible severability. Again, if a finding of antitrust violations were made by the court, the questions remain whether ASE is estopped from challenging the validity of the agreement since it has retained its benefits, and whether the antitrust violations can be a defense to a claim for royalties already due on goods sold under the terms of the agreement.

[19] 391 F.2d at 826.

[20] Wilko v. Swan, 346 U.S. 427, 438 (1953).

furthermore, has previously been termed "drastic relief," even where antitrust issues were involved.[21] As Mr. Justice Fortas stated in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, the plain meaning of the arbitration statute and the unmistakably clear congressional purpose was that "the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."[22] This basic purpose has led to the judicial determination that when there is doubt as to whether a matter is a proper subject of arbitration, the doubt is to be resolved in favor of arbitration.[23] In view of this apparent frustration of a legislatively favored public policy it is important to determine whether the public interest justifies the result reached in *American Safety Equipment* and *Aimcee*. This question requires examination of the public purpose of statutory grants of a private right to sue under antitrust laws, the provisions enacted to fulfill that purpose, the conflicting purpose and procedures of arbitration laws and the potential effect of the arbitration of antitrust issues on antitrust enforcement.

## II. Private Arbitration and Antitrust Enforcement

Private arbitration was designed as an instrument for the resolution of private business disputes. Private antitrust claims involve more than the resolution of the conflicting private interests of parties to such disputes; they require the interpretation and application of the public policy embodied in federal and state antitrust laws. Because this policy is one of major importance, the courts in the principal cases found it to be essential that they concern themselves with the effect that arbitration of the private antitrust claims facing them would have on the implementation of antitrust policy. The antitrust claims in the two cases were somewhat different in that, in *Aimcee*, Tomar sought the statutory remedy of damages, whereas in *American Safety Equipment*, ASE sought simply to have the license agreement declared invalid. In *American Safety Equipment* defendant-appellee Hickok sought to distinguish ASE's claim on that basis as it attempted to show that the public policy considerations were not relevant because ASE's antitrust claim arose not out of a statutory right to damages, but out of a contract dispute as a defense to a claim for royalties. Hickok, apparently admitting that a treble damage claim would not be arbitrable, claimed that a successful treble damage action required that it be proved that competition has been restrained and that public interests had been adversely affected. Where the antitrust claim was raised simply as a defense to a contract claim for the payment of royalties, Hickok argued, the award would not affect any public rights or in any way affect, much less restrain, competition.[24] The court, in rejecting Hickok's reasoning, stated: "We do not regard this distinction as significant if it is meant to persuade us that arbitrators rather than courts should declare whether contract provisions violate the Sherman Act."[25] ASE's declaratory

[21] Greenstein v. National Skirt & Sportswear Ass'n, 178 F. Supp. 681, 683 (S.D.N.Y. 1959).

[22] 388 U.S. 395, 404 (1966).

[23] Southern Bell Tel. & Tel. Co. v. Louisiana Power & Light Co., 221 F. Supp. 364, 369 (D. La. 1963).

[24] Brief for Appellee Hickok, supra note 9, at 22, 23.

[25] 391 F.2d at 827.

judgment actions seeking that the agreement be declared invalid required the resolution of the antitrust issues before the claim to royalties can be decided and thus require the interpretation and application of antitrust policy. Therefore, the court ruled that "the district court erred in submitting to the arbitrators 'the issue as to the validity' of the license agreement *insofar as that empowered the arbitrators to decide issues of antitrust law.*"[26] (Emphasis added.)

The question whether matters of public policy should be placed in the hands of arbitrators has arisen before. In *Kingswood Management Corp. v. Salzman*[27] the parties had agreed to arbitrate the issue of the attorney's fee incidental to a treble damage claim for rent overcharges under the Federal Emergency Price Control Act of 1942. The New York Appellate Division refused to enforce the arbitration award, even though neither party had resisted the arbitration, on the ground that, since the determination of the attorney's fee was incidental to the determination of the action, its enforcement would permit statutory public policy to be determined by arbitrators. Thus, the result in the principal cases should not be surprising. Arbitration is but a matter of contract[28] and parties may agree to arbitrate any matter as to which they may freely contract. But agreement to arbitrate matters of public policy is another question. The reason is that arbitration is peculiarly suited to its fundamental purpose: the prompt and economical solution of *private* business disputes. In return for speed and economy the parties to an arbitration must be willing to accept less certainty of a legally correct adjustment of their private interests.[29] In line with the policy of preventing the delays of court proceedings, arbitrators have authority to decide all legal as well as factual issues that are necessary for the resolution of an arbitrable dispute.[30] But they are not bound by judicial precedents nor held strictly to rules of law, nor are they required to apply the procedural and evidentiary standards necessary for strict legal determinations that make court proceedings protracted and expensive.[31] This policy of loose legal standards is justifiable where only the private interests of the parties are involved. Parties may certainly agree to such a compromise of their interests

> [w]here the controversy concerns rights which the parties may by agreement create, limit or define. . . . Where, on the other hand, the power of the parties to create, limit or define their rights and legal relations is restricted by law in the public interest, the parties cannot by stipulation or agreement remove or loosen the restriction.[32]

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[26] Id. at 828.

[27] 272 App. Div. 328, 70 N.Y.S.2d 692 (1947).

[28] Local 1505, IBEW v. Local 1836, Machinists, 304 F.2d 365 (1st Cir. 1962).

[29] Wilko v. Swan, 346 U.S. at 438.

[30] Continental Materials Corp. v. Gaddis Mining Co., 306 F.2d 952, 954 (10th Cir. 1962).

[31] See Marcy Lee Mfg. Co. v. Cortley Fabrics Co., 354 F.2d 42 (2d Cir. 1965); Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 174 N.E.2d 463, 214 N.Y.S.2d 353 (1961); Petition of Dover S.S. Co., 143 F. Supp. 738 (S.D.N.Y. 1956).

[32] Manhattan Storage & Warehouse Co. v. Movers Ass'n, 289 N.Y. 82, 89-90, 43 N.E.2d 820, 824 (1942).

The primary concern in reserving antitrust claims to the courts is the necessity of developing consistent antitrust standards. "Laws [are] a body of precepts or rules. . . . One of the reasons for the promulgation of these rules is the certainty of the guides so that one may know precisely to what standards one will be subject."[33] The confusion of standards that might very likely result from allowing arbitrators to interpret public policy unrestrained by judicial precedents and the necessity of strict legal determinations would seriously threaten the effectiveness of the laws enacted to promote such policy. Arbitration awards might impose on parties to arbitration standards of conduct much more or much less severe than those imposed as a matter of public policy on others by the courts. Parties to an arbitration agreement would have a very insecure foreknowledge of the standards by which they should govern their conduct. In fact, they might very well seek to avoid arbitration agreements for this very reason, to the discouragement of arbitration in the very fields in which it is desirable. The likelihood of differing determinations, furthermore, is increased greatly in an area as notoriously complex as antitrust litigation. A myriad of judicial precedents have been necessary to establish standards for "unreasonable" restraints of trade and per se violations of the antitrust laws. Judicial evidentiary standards and extensive discovery procedures for the examination of the dealings of the parties are vital to the determination of antitrust issues. These judicial standards, however, are inapplicable and inappropriate to arbitration proceedings. It has been suggested that some accommodation of these standards might be made within the arbitration proceedings.[34] But even if that were an acceptable adjustment, the competence of the arbitrators, usually chosen for their expertise in the business matters in dispute, hardly offers adequate assurance of proper application of the standards. Consider, for example, the difficulty where the federal antitrust claimant seeks to enforce his statutory right to use a prior government judgment or decree as *prima facie* evidence of his claim.[35]

> The determination of precisely what issues were adjudicated in the antecedent government suit is no easy chore, even for judges with backgrounds of legal experience who are presumably more skilled in analyzing the scope and effect of pleadings, trial records, and judgments. This type of complex legal analysis is out of place in an arbitration proceeding, particularly if the arbitrator, as may be the case, is not even a lawyer.[36]

The principal cases illustrate this problem. In *Aimcee* the arbitration panel was composed in part of two department store executives.[37] In *American Safety Equipment* ASE and Hickok had difficulty in agreeing on arbitrators from lists submitted by the American Arbitration Association. ASE, the anti-

[33] Kronstein, Arbitration Is Power, 38 N.Y.U.L. Rev. 661, 662 (1963).

[34] See Farber, The Antitrust Claimant and Compulsory Arbitration Clauses, 28 Fed. B.J. 90 (1968).

[35] Clayton Act § 5, 15 U.S.C. § 16 (1964).

[36] Farber, supra note 34, at 93.

[37] Brief for Appellant at 19, Aimcee Wholesale Corp. v. Tomar Prods., Inc., 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968).

trust claimant, crossed out the names of all who were not practicing lawyers familiar with antitrust problems, but Hickok, the antitrust defendant, crossed out all practicing lawyers familiar with antitrust and approved only those who were businessmen or money lenders.[38] This possible lack of legal expertise by the arbitrators is especially significant in light of the special danger presented by the antitrust claim in *Aimcee*. New York has no specific price discrimination statute such as the federal Robinson-Patman Act, and the question whether price discrimination, the basis of Tomar's claim, constituted a violation of the Donnelly Act has never been decided by the courts.[39] Thus the arbitrators would have been required to make an unprecedented determination of the state's antitrust policy. It would appear conceivable that such a determination could be totally at variance with the statutory scheme and judicial guidelines.

These considerations do not establish that arbitrators' decisions will necessarily contravene legislative and judicially established policies, but only that they would seriously threaten antitrust policy because of the loose legal standards of arbitration, the complexity of antitrust issues and the usual lack of legal expertise of arbitrators. Also, it is important to note that the opportunity for correction of errors is very limited. In a court proceeding errors of law are open to close scrutiny and correction on appeal. On the other hand, the decisions of arbitrators are essentially final and binding.[40] The merits of an award are not reviewable, and a court may not vacate or modify an award because of disagreement with the arbitrators' interpretation of the law or facts.[41] It is not suggested that arbitrators may or are likely to disregard the law. An arbitration award based on a "manifest disregard of the law" will not be enforced.[42] This "manifest disregard," however, must appear clearly on the face of the award,[43] and arbitrators are not usually required to make a complete record of the proceedings or even to give their reasons for their decisions.[44] In addition, in an area as complex as antitrust law a disregard of the law is not likely to be manifest. It would thus appear unlikely that judicial review of arbitration decisions would be effectual. Furthermore, extensive judicial review of an arbitration award would just as effectively frustrate the speedy and economical resolution of disputes as would the initial referral

[38] Brief for Appellant at 10, American Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968).

[39] Aimcee Wholesale Corp. v. Tomar Prods., Inc., 21 N.Y.2d at 629, 237 N.E.2d at 226-27, 289 N.Y.S.2d at 973.

[40] Wilko v. Swan, 346 U.S. at 436-37; James Richardson & Sons v. W.E. Hedger Transp. Corp., 98 F.2d 55, 57 (2d Cir. 1938), cert. denied, 305 U.S. 657 (1939).

Grounds for vacating or modifying an award under the United States Arbitration Act are found in 9 U.S.C. §§ 10-11 (1964). Grounds for vacating or modifying under the New York Arbitration Law are found in N.Y. Civ. Prac. Law § 7511 (McKinney 1963).

[41] Wilko v. Swan, 346 U.S. at 436; Raytheon Co. v. Rheem Mfg. Co., 322 F.2d 173, 182-83 (9th Cir. 1963); San Martine Compania De Navegacion, S.A. v. Saguenay Terminals Ltd., 293 F.2d 796, 800 (9th Cir. 1961); James Richardson & Sons v. W.E. Hedger Transp. Corp., 98 F.2d 55, 57 (2d Cir. 1938), cert. denied, 305 U.S. 657 (1939).

[42] Wilko v. Swan, 346 U.S. at 436; San Martine Compania De Navegacion, S.A. v. Saguenay Terminals Ltd., 293 F.2d at 801.

[43] See John W. Daniel & Co. v. Janaf, Inc., 169 F. Supp. 219, 224 (E.D. Va. 1958).

[44] See Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 244 n.4 (1962); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960).

of legal issues to the courts.[45] A party dissatisfied with an arbitration award could tie up its enforcement indefinitely.

The dangers from independent determination of public policy by arbitrators is particularly apparent in the highly institutionalized arbitration prevalent today.[46] Industrial and trade organizations exercise a high degree of regulation and control of arbitration within their own industries, and often provide their own arbitration machinery. Many commercial contracts, including form purchase orders, contain standard arbitration clauses of such organizations, calling for the use of their arbitration machinery. Others contain standard clauses of the independent American Arbitration Association, which has its own well-defined rules and procedures giving it a high degree of control. In any case, since expertise in the business matters in dispute is a criterion for selection of the arbitrators, there is a tendency to select arbitrators from within the area of industry involved. Such institutionalized arbitration, free from judicial supervision, has considerable power to establish and enforce separate and independent antitrust standards.[47] Arbitration institutions develop their own policies and standards which serve as guidelines for later arbitrations. Although not bound by these precedents, arbitrators affiliated with private interest groups are open to considerable pressure from these groups. In addition, because of the natural wariness of industry in general toward antitrust restrictions, the tendency would in all probability run in the direction of weakening antitrust standards. It is not intended here to criticize commercial arbitration operating within its proper sphere. It serves as a legitimate instrument of business self-government. However, "[i]t is not an answer that the arbitrators are probably reasonable men, and will probably do what is right between the parties. This question is one of power. Sometimes arbitrators are unreasonable men or abuse power."[48] Thus, side by side with judicially determined antitrust standards, there might very well develop several separate and independent standards controlled by private interests. Ironically, the courts may then be called upon to enforce awards made on the basis of these divergent standards.

This power of arbitration to avoid the strict legal requirements of statutory antitrust policy also leads to a substantial danger of the use of arbitration by parties seeking to insulate themselves from the full force of the antitrust laws. The danger that commercial arbitration might be used to block the implementation of legislation designed to safeguard public interests has been foreseen.[49] Nowhere is this danger more clear than in the antitrust field. The private antitrust action is designed primarily to protect the public interest in a free, competitive economy and only secondarily and incidentally to com-

[45] Saxis S.S. Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967).

[46] See Kronstein, supra note 33.

[47] Id. at 699.

[48] East India Trading Co. v. Halari, 305 N.Y. 866, 869, 114 N.E.2d 213, 214 (1953) (dissenting opinion).

[49] "Commercial arbitration has been highly successful in bringing a businessman's adjudication to business questions. But it would be vastly unfortunate if it became usable as a device to blunt or break social legislation." Wilko v. Swan, 201 F.2d 439, 445 (2d Cir. 1953) (dissenting opinion).

pensate the injured party.[50] The broad aim of statutory provisions for private suits, therefore, is to supplement government action by using private self-interest as a means for enforcement of the antitrust laws.[51] The self-interest of the federal antitrust claimant is fostered by liberal provisions in the Clayton Act[52] favoring the claimant. He is given a wide choice of forum.[53] The successful claimant recovers treble damages plus the cost of suit, including reasonable attorney's fees.[54] In addition, to lessen the claimant's burden in potentially complex and protracted litigation, any judgment or decree received by the United States against an antitrust defendant shall be *prima facie* evidence against that defendant in any private antitrust action brought by any person against him.[55] These provisions were primarily intended to make it easier for the small claimant to bring suit.[56] To permit the arbitration of antitrust claims would be to move in a direction completely contrary to this clear congressional purpose. An intended monopolist, being frequently in a bargaining position superior to that of his customer and wishing to avoid the stringent requirements of the antitrust laws, could protect himself by imposing an arbitration agreement on his customer. The wide choice of forum available to the claimant was intended to overcome the obstacle facing the small claimant in the necessity of bringing suit in a distant forum.[57] Yet very frequently arbitration agreements specify the site of arbitration, and the power of the stronger party to dictate the site would preclude the advantage to the smaller party. The court in *American Safety Equipment* evidenced its concern over this issue by stating: "[I]t is also proper to ask whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations. Here again, we think that Congress would hardly have intended that."[58] Furthermore, the treble damages provision, which serves as an important incentive to the small claimant and also as a strong enforcement tool, "would seem on its face applicable only to lawsuits and not to arbitration proceedings."[59] It has been held that antitrust treble damages are enforceable only in federal courts.[60] Thus it seems very likely that the stronger party could also evade this deterrent to his illegal conduct. In addition, the inhibition of the claimant because of the unpredictability of the standards which he would meet in arbitration is compounded by the loss of the treble damage incentive.

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50 Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 214 F.2d 891, 893 (5th Cir. 1954), cert. denied, 348 U.S. 912 (1955).

51 Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947).

52 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1964).

53 15 U.S.C. §§ 15, 22. This provision was more relevant in 1914 when the Clayton Act was enacted and choice of forum was generally more restricted than today.

54 15 U.S.C. § 15 (1964).

55 15 U.S.C. § 16 (1964).

56 Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 319 (1965).

57 See Eastland Constr. Co. v. Keasbey & Mattison Co., 358 F.2d 777, 780 (9th Cir. 1966); West Virginia v. Morton Int'l, Inc., 264 F. Supp. 689, 691 (D. Minn. 1967).

58 391 F.2d at 827.

59 Farber, supra note 34, at 93.

60 Williamson v. Columbia Gas & Elec. Corp., 27 F. Supp. 198 (D. Del), aff'd, 110 F.2d 15 (3d Cir. 1939), cert. denied, 310 U.S. 639 (1940).

A further advantage to a party desiring to shield himself from the force of the antitrust laws is the confidential nature of arbitration. This quality serves to contravene directly the effect of private antitrust suits in exposing violations and bringing them to the attention of the government and other private parties. In fact, it serves to enhance what the court in *Aimcee* terms the "clandestine" nature of antitrust violations.[61] To provide better protection of the public interest, New York added a statutory requirement in 1959 that the State Attorney General be given notice of all civil actions brought under the Donnelly Act.[62] Whether this requirement applies to arbitration proceedings is at least open to question, as indicated by the fact that such notice was not given in *Aimcee*. Nevertheless, if it is considered applicable, as the court in *Aimcee* points out, "it is inconceivable that the Attorney General would seek to vindicate the public interest before a private arbitration panel."[63]

It is not only in the situation of unequal bargaining positions that this danger of insulation from the force of the antitrust laws is apparent. Businessmen dealing at arm's length might very well desire to shield their dealings from the full impact of the antitrust laws and from public scrutiny, and can do so to a large extent by the simple expedient of agreeing to arbitration. The court in *Aimcee* was aware of both situations when it stated:

> [I]t must be recognized that through the use of economic power and contracts of adhesion, containing broad arbitration clauses, antitrust violators may be able to insulate their transgressions of the antitrust law from judicial scrutiny. The opportunity for abuse is apparent. Under various guises, an industry, while nominally assuring obedience to the State's antitrust law, may in reality be establishing and enforcing entirely unacceptable practices.[64]

The suggested alternative solution of requiring arbitrators to give full effect to the statutory requirements where statutory public policy is involved is doubtlessly feasible.[65] Requiring arbitrators to give effect to the antitrust claimant's choice of location would not violate arbitration policy. The purpose in allowing prior government decrees as *prima facie* evidence to lessen the burden of private claimants is actually in harmony with the policy behind arbitration to provide economical and swift settlements of disputes. Nor would it be inconsistent with arbitration policy to require arbitrators to give effect to the treble damage and cost provisions. In addition, requirements of notice, such as the New York provision, could easily be made applicable to arbitration proceedings. The question, however, remains one of suitability. What adjustment will best serve to implement the policies underlying antitrust enforcement and commercial arbitration? Even if arbitrators were to give full effect to the requirements of the antitrust laws, this practice would not alleviate the problems of giving effect to prior government decrees and interpreting

[61] 21 N.Y.2d at 625, 237 N.E.2d at 224, 289 N.Y.S.2d at 970.
[62] N.Y. Gen. Bus. Law § 340(5) (McKinney 1968).
[63] 21 N.Y.2d at 627, 237 N.E.2d at 226, 289 N.Y.S.2d at 972.
[64] Id. at 629, 237 N.E.2d at 227, 289 N.Y.S.2d at 973-74.
[65] Farber, supra note 34, at 92-93.

judicial antitrust precedents. With the finality of arbitration awards there is no means to review the arbitrators' understanding of problems of burden of proof and evidentiary requirements.[66] In addition, the basic approach taken to a dispute by arbitrators may have an adverse effect upon antitrust enforcement. In this regard, the court in *Aimcee* stated:

> [W]e cannot overlook the fact that many undeserving litigants are awarded damages in antitrust cases. Arbitrators are more likely to give more consideration to equitable notions such as waiver, estoppel and *in pari delicto*. Every time this is done, however, the deterrent effect of the law on antitrust violations is severely diminished.[67]

For these reasons it would appear that the suggested solution of accommodating arbitration procedures to the requirements of the antitrust laws offers inadequate assurance that arbitration will meet the standards essential to antitrust enforcement.

It must be noted that the decision to reserve antitrust issues to the courts, though supported by the desire to preserve the effectiveness of antitrust enforcement and judicial development of substantive antitrust law, would also appear important to the preservation of the effectiveness of arbitration. As noted previously, in some circumstances the uncertainty of standards in arbitration might deter the use of arbitration even within its proper sphere. In addition, extensive discovery procedures and the strict legal determination of antitrust issues would undo the speed and economy of arbitration. One of the dangers to arbitration is the possibility that frivolous antitrust claims will be interjected by a party in a weak position on the initial business issues in order to confuse and cloud the original issues. Such insubstantial claims might also be raised to delay arbitration. Nevertheless, even though these claims would have to be referred to the courts, the courts are far more competent to determine quickly their lack of merit. Thus the assignment of the antitrust issues to the courts would result in a more efficient determination of their merit while it would leave the arbitration process free of retarding antitrust complexity. This division of labor would appear far preferable to an attempt to resolve both antitrust and normally arbitrable questions totally by the arbitration process. The latter arrangement would fail of both the consistent enforcement of antitrust law and of the speed and economy sought through arbitration.

In one sense arbitration of antitrust issues would seem to support antitrust enforcement by offering a less expensive forum for the small claimant whose prospects of success are such that he would be unwilling to undertake the expense of a court suit. An immediate answer to this argument is the objection that the advantage of economy by arbitration would be lost by the introduction of the antitrust claims. More importantly, the necessity of consistent interpretation of antitrust policy overrides any additional incentive that might be provided for such a claimant. Though it would seem unlikely that it could be determined prior to the arbitration proceeding which party would fare better, logically the party with the weaker legal position

[66] Wilko v. Swan, 346 U.S. at 436.

[67] 21 N.Y.2d at 629, 237 N.E.2d at 227, 289 N.Y.S.2d at 973.

would seek arbitration and the other party would resist it. Even if it is the claimant who insists on arbitration, however, it must be noted that the antitrust defendant has an equally strong interest in the legal safeguards of judicial proceedings. As mentioned earlier, he might very likely be subjected to standards much more or less severe than those imposed as a matter of public policy on others by the courts. Indeed, he might be confronted with the very real dilemma of two separate and divergent standards, one in arbitration and one in court.

This belief that the policy considerations are determinative in whatever context the antitrust issues arise and regardless of which party raises them was underscored by the court in *Aimcee:*

> The fundamental issue here is the appropriateness of arbitration for the consideration of antitrust problems. This question persists no matter in what procedural context the issue arises in arbitration. Our decision cannot properly turn on the happenstance of who initiates the litigation or arbitration.[68]

In *American Safety Equipment* the court made the statement that "we do not deal here with an agreement to arbitrate made after a controversy has already arisen."[69] This language would seem to suggest that the parties might agree to arbitrate after a dispute involving antitrust issues arose. However, the court went on to state that it did not think that disputes involving antitrust issues were among those situations where "Congress has allowed parties to obtain the advantages of arbitration."[70] This view seems clearly to preclude even the situation where both parties agree to arbitrate.

## III. Conclusion

The analysis of the potential impact on antitrust enforcement from arbitral determination of antitrust issues raises again the initial question whether the public interest justifies the blanket rule laid down by the courts in *American Safety Equipment* and *Aimcee.* In *American Safety Equipment* appellee Hickok claimed "[t]here is no evidence of any kind that the public has been damaged or that competition has been restrained."[71] This contention would seem to beg the question. If the license agreement violated the antitrust laws, then there was a public injury. Any unreasonable restraint of trade is in itself injurious to the public in general. The potential magnitude of public injury is described by the court in *American Safety Equipment:*

> Antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage. Thus, in the recent "electrical equipment" cases, there were over 1,900 actions, including over 25,000 separate damage claims, commenced by purchasers of equipment allegedly illegally overpriced. The pur-

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[68] Id. at 625, 237 N.E.2d at 224, 289 N.Y.S.2d at 970.
[69] 391 F.2d at 827.
[70] Id. at 828.
[71] Brief for Appellee Hickok, supra note 9, at 23.

> chasers in turn sold electricity to millions of consumers at rates presumably increased by the excessive costs.[72]

The principal cases did not involve claims which suggested public injury of such magnitude. But, as the Court of Appeals noted in *American Safety Equipment*, a rule governing the arbitrability of antitrust claims must take into account its own potential effect.[73] At the very least, the resolution of *any* antitrust claim involves something more than the interests of the private parties involved. The results of erroneous decisions by arbitrators of solely private claims, as opposed to antitrust claims, are very different. The *Aimcee* court observed:

> If the arbitrators here should decide wrongly that the goods were or were not defective, the injustice done is essentially only to the parties concerned. If, however, they should proceed to decide erroneously that there was or was not a violation of the Donnelly Act, the injury extends to the people of the State as a whole. To illustrate, if Tomar is correct in its claim that the rebate here violates the Donnelly Act, and the arbitration panel should deny the claim, then in effect the arbitrators have permitted Aimcee to receive an unjustifiable price reduction which weakens the position of Aimcee's competitors. Conversely, if Tomar is incorrect in its contention, but the arbitrators should rule in its favor, then the award may be passed on to the consumer in the form of higher prices.[74]

Thus erroneous findings of antitrust violations are as contrary to the public interest as non-enforcement. Legitimate compacts for solid business reasons are economically efficient, as they tend to reduce costs and thereby to lower prices. Since only "unreasonable" restraints of trade are against public policy, to restrain legitimate practices is as deleterious to free competition as are antitrust violations. The "compelling interest in having a uniform and consistent interpretation"[75] of the antitrust laws weighs equally against too severe or too lenient interpretations of the laws.

Two statutory policies of major importance on the national and state levels appear to be in conflict in the principal cases. The decisions suggest a resurgence of judicial hostility to commercial arbitration. There is present the same concern about surrender by the courts of their jurisdiction over matters of public policy. But this concern seems to be a legitimate one in some circumstances. It is possible to reconcile the procedures of arbitration and the requirements of antitrust enforcement, but the cost to the effectiveness of both leads to the conclusion that such a reconciliation is far from desirable. From a policy standpoint the decisions in the principal cases would seem to offer the best solution in the interests of antitrust enforcement and of effective arbitration in dealing with those business matters within its intended sphere. The courts alone can provide adequate legal safeguards for the

72 391 F.2d at 826-27.
73 Id. at 827.
74 21 N.Y.2d at 627, 237 N.E.2d at 225, 289 N.Y.S.2d at 971-72.
75 Farber, supra note 34, at 94.

public interest in antitrust claims, and private arbitration is best suited for dealing with private business matters expeditiously. The courts are in a better position to determine the substantive merit of antitrust claims. If the claims have merit, the courts are the competent and most efficient forum for resolving them so that arbitration may proceed on other arbitrable issues. If the courts determine the claims to be frivolous, arbitration may proceed to decide the relevant issues unhampered by the antitrust issues. This solution does not disparage the arbitration process. Rather it seeks to confine that procedure to the manageable task of everyday settlement of practical business problems.[76]

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[76] See 21 N.Y.2d at 630, 237 N.E.2d at 227, 289 N.Y.S.2d at 974.